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IN THE

Supreme Court of the United States

MCGLADREY & PULLEN, LLP,

Petitioner,

v.

NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITIONER'S REPLY BRIEF

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Respondent devotes little attention to the criteria this Court applies when determining whether to grant certiorari. That is because this Court's traditional considerations clearly support review here. Respondent does not dispute that there is no way to square the decisions below with the New Hampshire Supreme Court's decision in *Appeal of Sutfin*, 693 A.2d 73 (N.H. 1997). Opp. 19. Respondent does not dispute that a plurality of this Court in *Peel* v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 108 (1990), concluded that *de novo* review is appropriate for commercial speech questions in cases arising out of state professional regulatory board proceedings. Opp. 11-12. And respondent only superficially attempts to distinguish numerous other cases in both the state supreme courts and this Court, all of which apply *de novo* review to a decision of a state professional regulatory board that restricts speech. Whether

courts will play a meaningful role in protecting speech rights through *de novo* review in such cases is an important question, the answer to which will determine whether speech rights are consistently enforced throughout the nation. Certiorari is warranted here.

The bulk of respondent's legal analysis is devoted to defending the propriety of substantial evidence review here. Those arguments only further support this Court's intervention because they demonstrate that the argument for substantial evidence review depends on the disturbing expansion of this Court's decisions in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and *Friedman* v. *Rogers*, 440 U.S. 1 (1979). In the end, respondent's position rests on a hostility to commercial speech rights nowhere to be found in this Court's decisions.

The balance of the Brief in Opposition argues that this is an inappropriate case to review the question, largely because petitioner's proposed name change could not survive even *de novo* court review. But respondents ignore the conspicuous fact that petitioner's competitors have likewise adopted brand-name designations that they share with distinct entities that provide non-attest services that their clients desire. There is no indication that anyone in North Carolina or anywhere else has been deceived or confused by the KPMG, BDO, Deloitte or Ernst & Young brands being applied to a variety of entities. Likewise, there is no reason to believe that anyone will be deceived or confused when petitioner changes its name to associate itself with the RSM brand.

1. Certiorari is appropriate to clarify the standard of review in cases arising from a state professional regulatory board decision to restrict commercial speech. In *Peel*, a plurality of this Court declared that in cases arising from decisions of state professional regulatory boards that limit First Amendment rights: "[w]hether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this

Court should exercise *de novo* review." 496 U.S. at 108. Respondent rightly points out, as petitioner itself acknowledged, that this critical statement appears in a plurality opinion. Opp. 11-12. That fact only highlights the need for this Court to declare, clearly and authoritatively, whether the *Peel* plurality's position that *de novo* review is required reflects how commercial speech should be protected under the First Amendment.

Petitioner argued that the view of the plurality in *Peel* reflects this Court's practice, both before and since *Peel*. In cases like *Edenfield* v. *Fane*, 507 U.S. 761 (1993), *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626 (1985), *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and *Ibanez* v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), this Court performed independent, nondeferential review of the record in cases involving commercial speech restrictions imposed by professional regulatory boards. Petitioner also pointed out that these commercial speech decisions were consistent with the approach to free speech protection outlined in other cases. Pet. 19-21. Petitioner further identified a number of state supreme court decisions, including not only *Sutfin* from New Hampshire, but also decisions from Pennsylvania, Iowa and Alabama, that clearly state that *de novo* review is required when a party raises a First Amendment challenge to state agency or board action. *Id.* at 13-14.

Respondent makes no attempt whatsoever to reconcile the independent review conducted by the New Hampshire Supreme Court in *Sutfin* and this Court in *Edenfield*, *Zauderer* and *Ibanez* on the one hand with the North Carolina courts' decisions to conduct substantial evidence review here. The conflict on such a fundamental and recurring speech issue plainly warrants review. Further, respondent's effort to distinguish the various other cases demonstrates how far this Court's free speech cases must be bent to support a rule adopting substantial evidence review.

Respondent points out that several cases relied upon by petitioner involve First Amendment rights outside the commercial speech context. Opp. 13, 19-20. Emphasizing that this Court has established a lower *substantive* standard for evaluating restrictions on commercial speech,[1] respondent argues that the courts should also engage in more *deferential review* of the record in such cases. *Id.* at 13-15, 20. In short, respondent is arguing that cases applying *de novo* review of the record outside the commercial speech context have no application to this commercial speech case.

Respondent's effort to defend the North Carolina courts' decision to apply substantial evidence review only underscores the propriety of this Court's review to protect against the unwarranted contortion of this Court's free speech decisions. There is no dispute that *Central Hudson* establishes the applicable substantive standard in commercial speech cases. What is at issue here is the extent to which a court should independently review the factual record to determine whether that substantive standard has been met. Respondent's defense of deferential review thus depends on a radical extension of *Central Hudson*'s treatment of commercial speech. It is one thing to say that commercial speech restrictions can be justified on a showing of a lesser state interest. It is quite another to say that judicial review of the required showing will be deferential for commercial speech cases and *de novo* for other cases. Respondent relies on *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 635 (1995), which states that commercial advertising receives "a lesser degree of protection under the First Amendment." *Id.*; Opp.

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[1] The government may lawfully restrict commercial speech based upon a showing that the restriction is designed carefully to advance a substantial state interest. *Central Hudson*, 447 U.S. at 564. With respect to other expressive conduct, the government must demonstrate that the restriction advances a compelling state interest by the least restrictive means. *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989).

15. But as that decision makes clear, a court can apply a lesser substantive standard, even as the court engages in a "scouring [review of] the record" to ensure that the standard is met. 515 U.S. at 628.

Further, the fact that the speech at issue in this case was found by respondent to be "deceptive," and thus entitled to no First Amendment protection at all, is significant. Pet. App. 8a; *Central Hudson*, 447 U.S. at 563. This case, like the various cases cited in the petition discussing obscenity or incitement of unlawful action, Pet. 20-21, involves drawing the line between protected and unprotected speech. This Court has consistently insisted that that line must be drawn by a court. *Id.* at 19-21. Respondent's defense of the North Carolina courts' application of substantial evidence review would create an exception for commercial speech cases: the line between protected and unprotected commercial speech would be drawn by various state professional regulatory boards, bodies which lack experience with free speech issues and whose members potentially possess interests in suppressing the commercial speech of competitors.[2] Whether respondent or petitioner is right is ultimately a matter for this Court to decide on the merits. What matters now is that the question whether this Court's decisions ensuring *de novo* judicial review of the record in cases drawing the line between protected and unprotected speech should be abandoned when commercial speech is at issue merits this Court's review.[3]

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[2] Respondent misunderstands petitioner to be belatedly arguing that the Board was biased. Opp. 9-10. Petitioner's point is one of institutional capacity, not bias in this particular case. A general rule permitting deferential review in these cases is inappropriate because state professional regulatory boards have no expertise with free speech principles and may be influenced by anti-competitive interest.

[3] Respondent's argument that Congress has delegated certain powers to state accounting boards, Opp. 27-28, ignores the fact that none of those acts transfers the responsibility for protecting the *constitutional rights*

Respondent's assertion that *Friedman* v. *Rogers*, 440 U.S. 1 (1979), answers the question presented similarly reflects a dramatic extension of what that case actually held. It is true that *Friedman* is a case involving this Court's review of allegedly deceptive trade names. But, contrary to respondent's suggestion, Opp. 20-21, *Friedman* takes no express position on whether a court should engage in *de novo* review of whether a trade name is deceptive. In fact, after concluding that the prevention of deception is a government interest that would support prohibiting commercial speech, this Court carefully reviewed the record, including deposition testimony and prior examples of deceptive behavior, to conclude that it was "well demonstrated" that the trade names at issue were deceptive. *Friedman*, 440 U.S. at 13-15. The optometrists in *Friedman* received far more court review of the record than did petitioner here. Indeed, the court satisfied itself that optometrists in Texas, including one of the parties before it, had frequently used trade names to deceive the public. Petitioner has not had the benefit of the same level of court review. In any event, respondent's argument that *Friedman* creates a trade-name exception to what numerous other cases suggest should receive *de novo* review only further underscores the need for this Court's review to clarify the scope of its prior decisions.

2. This is an appropriate case for this Court to determine whether de novo *review should be applied to state professional regulatory board decisions restricting commercial speech.* Respondent offers various thinly reasoned grounds for rejecting review in this case. None should prevent this Court from granting certiorari.

Almost in passing, respondent argues that petitioner failed to seek *de novo* review in the North Carolina courts. Opp. 28. That is false. In its briefs in every court, petitioner asserted

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of anyone, including accountants, from its traditional home in the courts.

that it was entitled to *de novo* review of the factual basis for the Board's ruling. The issue has been properly preserved for this Court's review.[4]

Respondent also asserts that because petitioner sought a declaratory ruling from respondent that it was entitled to change its name, petitioner bore the burden of proof to establish that its name was not deceptive. Opp. 7-8. But who bore the burden of proof before the Board is irrelevant. The fact is that the Board concluded that petitioner's proposed name was deceptive. Pet. App. 22a. When petitioner challenged that ruling, the courts reviewed the record to determine whether the Board's decision was supported by substantial evidence. *Id.* at 8a, 17a-18a. Petitioner questions the propriety of the North Carolina courts' deferential review of the record, and contends that it is entitled to change its name unless the record reveals that its proposed name is, in fact, deceptive. Petitioner asks this Court to hold that *de novo* review of the record is compelled under the First Amendment.[5]

Respondent devotes substantial space in its opposition to its claim that petitioner's proposed name is, in fact, deceptive, and that the Board's ruling could survive *de novo* review. Opp. 16. Respondent makes the point in various forms. For example, respondent summarizes the evidence it presented to justify its finding, almost all of which was presented for the first time in court, not during the administrative proceeding.

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[4] Respondent also asserts that petitioner's failure to note the undisputed and indisputable fact that the First Amendment has been applied to the states through the Fourteenth Amendment is "perhaps fatal" to the petition. Opp. 3, 18-19. Given that the interpretation of the Fourteenth Amendment is not at issue in this case, it is difficult to understand what respondent is arguing.

[5] In any event, it "is well established that '[t]he party seeking to uphold a restriction carries the burden of justifying it.'" *Edenfield*, 507 U.S. at 770 (alteration in original) (quoting *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983)).

Id. at 5-7. But repetition of that evidence does not make it any more compelling. For the reasons stated in the petition, the evidence in the record, including the evidence introduced for the first time in court in an effort *post hoc* to justify the Board's finding, falls far short of establishing that petitioner's proposed name is deceptive. Pet. 9-10, 25-30.

Respondent simply ignores the most salient reason to doubt that petitioner's proposed name is deceptive to the public. Petitioner's proposed name change is a particular instance of a broad industry trend. The RSM brand that petitioner seeks to incorporate into its name and share with other non-attest companies is no more likely to deceive the public than other well-recognized brands like KPMG, BDO, Deloitte, and Ernst & Young, all of which are incorporated into the names of various attest and affiliated non-attest entities.[6] If respondent is right on the merits, then there must be widespread confusion in the industry. Before a court reaches such an improbable conclusion, it should insist on at least *some* evidence in the record that *anyone* has been confused by attest firms incorporating such brands into their names. Yet there is no such evidence here.

Respondent goes further in its effort to justify the Board's decision on the merits, arguing that a trade name conveys no useful information and therefore warrants no First Amendment protection. Opp. 10-11. Common sense suggests otherwise, given the substantial sums that firms

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[6] Respondent argues that petitioner is trying to have its cake and eat it too by arguing here that it is affiliated with other RSM entities, but arguing in an unrelated proceeding that it is a "'distinct legal entit[y]'" from RSM McGladrey, Inc. Opp. 25. But there is no inconsistency. Even such closely related entities as sister corporations are "distinct legal entities" despite the affiliation between them. Moreover, respondent twice misquotes the petition as reflecting petitioner's desire to "'better inform the public of its affiliation with' RSM McGladrey," *id.* at 24 (emphasis omitted), when the petition actually states that the affiliation is with *RSM International*. Pet. 5.

invest in branding themselves and the substantial literature explaining the way a brand efficiently communicates critical attributes to potential customers. Pet. 5-8. This Court has itself recognized that a trade name "acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality." *Friedman*, 440 U.S. at 12. Contrary to respondent's suggestion, petitioner does not seek to employ "the RSM initials [to] help the public identify Petitioner as a firm specializing in attest services." Opp. 11. The phrase "Certified Public Accountants," which is part of petitioner's proposed name, would accomplish that. The use of the RSM brand communicates adherence to the high standards of RSM International ("RSMI") and access to the international resources of RSMI affiliates.[7] This is precisely the kind of information the public should have available to it.[8] Indeed, as *Friedman* noted, "the trade name is used as part of a proposal of a commercial transaction." 440 U.S. at 11.

In the end, petitioner has been denied the right to communicate that it is affiliated with, and lives up to the

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[7] Respondent notes that Salustro Reydel, the source of the "S" in "RSM," has left the organization. Opp. 3. But this late-submitted fact is irrelevant. The RSM brand has significance independent of its particular affiliates. Those who choose to affiliate with RSM, and demonstrate to the satisfaction of the owner of the RSM brand (RSMI) that they meet the high standards of the organization, display the RSM brand to communicate those facts to potential clients.

[8] It is no answer that petitioner could advertise its affiliation in its letterhead. Opp. 11, 29. The North Carolina courts did not justify the Board's decision on the ground that the Board has allowed petitioner to communicate its affiliation in alternative ways, but instead concluded that substantial evidence supported the conclusion that the proposed name is unprotected speech because it is deceptive. In any event, petitioner, like several of its competitors, seeks to avail itself of the uniquely powerful communicative effect of incorporating the RSM brand into its name. It should be permitted to do unless the evidence in the record, reviewed *de novo*, demonstrates that denying the name change would clearly advance some substantial government interest.

standards of, the international organization of RSMI and that unlike other RSM entities, it performs attest services within the United States. That denial is based on a finding that its proposed name is deceptive despite the paucity of evidence in the record to support the conclusion. *De novo* court review would preserve petitioner's right to brand itself and thereby contribute to the free flow of commercial speech that this Court has repeatedly recognized as vital to our economy.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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